Supreme Court, U.S.
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No. 95-1348

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FRED LOWENSCHUSS,

Petitioner,

v.

RESORTS INTERNATIONAL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly affirmed the ruling of the District Court that the Bankruptcy Court erred by discharging the claims of a creditor against a non-debtor, when no Court of Appeals has ever permitted a bankruptcy court to extinguish claims of a creditor against a non-debtor unless the debtor's plan of reorganization gave the creditor an alternative source of full recovery to which the non-debtor had contributed.

2. Whether the Court of Appeals correctly affirmed the ruling of the District Court that the Bankruptcy Court abused its discretion when it denied a creditor's motion for dismissal with conditions and failed to consider any of the equities presented by the creditor.

3. Whether the Court of Appeals correctly held that a creditor's appeals of a plan of reorganization's confirmation order and a claim withdrawal order were not moot after substantial consummation of the plan, where the debtor was an individual with no business to reorganize and where the value of the bankruptcy estate would be substantially augmented if the debtor failed in his effort to exempt the assets of his multi-million dollar pension plan or his beneficial interest therein from the estate.

PARTIES INVOLVED

Respondent Resorts International, Inc. changed its corporate name to Griffin Gaming & Entertainment, Inc. ("GGE") on June 30, 1995. GGE is the parent company and has no nonwholly owned subsidiaries.

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FRED LOWENSCHUSS,

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RESORTS INTERNATIONAL, INC.,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondent Resorts International, Inc. respectfully requests that this Court deny the petition for certiorari, which provides no basis for review by this Court. This case, which tells the story of an individual debtor's abuse of the bankruptcy process, is in an interlocutory posture. The ruling

below does not raise a novel or timely issue and does not conflict with any other circuit court.

STATEMENT OF THE CASE

Petitioner Fred Lowenschuss is a debtor in an ongoing bankruptcy case in the District of Nevada. The case is still active because the threshold issue has yet to be decided -- whether petitioner's multi-million dollar beneficial interest in his pension plan (the "Plan") is part of his bankruptcy estate.

Two events precipitated the filing of petitioner's voluntary bankruptcy petition. First, Resorts was on the eve of trial in its action against the Plan in a bankruptcy court in New Jersey. Resorts was claiming that petitioner, who was the trustee, administrator, sponsor, and sole beneficiary of the Plan, had defrauded Resorts out of almost $4 million in cash. Upon his bankruptcy filing, petitioner sought and obtained an order staying Resorts' action against the Plan pursuant to Bankruptcy Code section 362. The trial date was thus canceled.

Second, a bench warrant had been issued for petitioner's arrest in Pennsylvania, where he had lived and practiced law for 20 years. The warrant stemmed from his willful failure to transfer millions of dollars in assets to his former wife pursuant to a final judgment in his protracted divorce action. Rather than transfer the assets to his former wife, petitioner transferred them out of Pennsylvania to bank accounts under his control in Florida and California. The assets have never been transferred to petitioner's former wife, and the arrest warrant has never been executed. Petitioner then fled to Nevada to commence his bankruptcy case. Respondent's Appendix at 3a, 9a, 10a.

Believing that the assets of the Plan might constitute property of petitioner's individual bankruptcy estate, Resorts filed proofs of claim based upon its pending action in New Jersey against the Plan.

On July 21, 1993, the Nevada Bankruptcy Court granted petitioner's motion and held that neither the Plan nor petitioner's beneficial interest in it were part of his bankruptcy estate. Petitioner's former wife appealed, and the issue remains unresolved to this day.[1]

Because Resorts' claims were against the Plan, it did not matter to Resorts whether the Plan or petitioner's beneficial interest therein was or was not part of petitioner's bankruptcy estate. (In this regard, Resorts was different from petitioner's other creditors, who would receive almost nothing if the Plan and petitioner's beneficial interest therein were exempted from the estate.)

Following the ruling that excluded the Plan from the estate, Resorts sought to withdraw its proofs of claim so that it could prosecute its claims against the Plan in Resorts' pending action in New Jersey. Resorts asked to do so on the condition that it would have the right to reinstate its claims if the ruling excluding the Plan were reversed on the appeal filed by petitioner's former wife. The Bankruptcy Court denied

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[1] On appeal to the Nevada District Court, that court vacated the Bankruptcy Court's ruling and remanded for further evidentiary hearings. Although those hearings have been held, the Bankruptcy Court has not yet issued a ruling on the question. Respondent's Appendix at 1a-2a, 15a.

Resorts' request to withdraw with this condition and compelled Resorts to withdraw its claims with prejudice.

After Resorts' withdrawal, the petitioner proposed, and the Bankruptcy Court approved, a plan of reorganization that, among other things, granted *the Plan* a release from Resorts' claims against it. Thus, the Bankruptcy Court extinguished Resorts' claims against both the debtor and the Plan so that Resorts could not pursue its claims in any forum. In addition, the confirmation order purported to have the Bankruptcy Court assert jurisdiction over Resorts' claims against the Plan, which were still pending in New Jersey.

The net effect of the Bankruptcy Court's orders was that Resorts would receive nothing from the estate, that Resorts' claims against the Plan were discharged even though the claims had never been tried and even though Resorts had received no compensation from the Plan or elsewhere for those claims, and (redundantly) that, if Resorts moved to sue the Plan, Resorts had to do so in the Nevada Bankruptcy Court.

Resorts appealed three rulings of the Bankruptcy Court to the Nevada District Court; all three rulings were reversed. The District Court ruled that the Bankruptcy Court:

> (a) lacked power to grant a release in favor of a non-debtor, the Plan;
>
> (b) lacked jurisdiction to adjudicate claims of a non-creditor, Resorts, against a non-debtor, the Plan; and
>
> (c) abused its discretion in not permitting Resorts to withdraw its proofs of claim on the

> condition that it would have the right to reinstate them if the Plan ultimately were ruled to be part of the estate.

Petitioner's Appendix at 46a-48a.

Petitioner appealed to the Court of Appeals for the Ninth Circuit, which affirmed on all issues. Id. at 6a, 21a. Thereafter, the trial of Resorts' action against the Plan finally proceeded in the bankruptcy court in New Jersey. The bench trial concluded six months ago; decision has been reserved.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI IN THIS CASE TO ADDRESS THE ISSUE OF A BANKRUPTCY COURT'S AUTHORITY TO RELEASE NON-DEBTORS.

The principal argument presented in the Petition is that "courts have increasingly granted non-debtor releases . . . [under] Section 105(a) of the Bankruptcy Code," Petition at 8, and that the refusal of the Court of Appeals to do so here reflects a clear and sharp split among the Courts of Appeals on this issue. In fact, no such split exists.

First, it is premature for this Court to address the issue of non-debtor releases in this case because the Plan's continued status as a non-debtor is uncertain. If the Bankruptcy Court finds, on remand, that the Plan is part of petitioner's bankruptcy estate, there will no longer be any non-debtor against whom to release any claims. (*See* Section A below.)

Second, no Court of Appeals has ever actually affirmed on the merits a plan of reorganization providing for a discharge or release of claims by a creditor against a non-debtor. In making this argument, the Petition simply misreads the cases. (*See* Section B below.)

Third, Congress amended the Bankruptcy Code in October 1994, months after the confirmation of the plan of reorganization in this case, to add Code section 524(g), which permits bankruptcy courts to issue "channeling" injunctions preventing suits against non-debtors in chapter 11 cases involving asbestos claims. Except for the Ninth Circuit, no Court of Appeals has yet cited to that section or had occasion to consider its effect on prior case law. (*See* Section C below.)

Finally, several factual and legal issues in this case make it an unsuitable vehicle for this Court to address the law in this area. (*See* Section D below.)

A. It Is Premature For This Court To Rule On The Release Of Non-Debtors Because The Plan's Status As A Non-Debtor Is Uncertain.

The Bankruptcy Court has not yet ruled on the question of whether the Plan and its assets are property of the bankruptcy estate. If they are, the Plan's status as a non-debtor will disappear and with it the issue of non-debtor releases. There will only be petitioner's bankruptcy estate -- augmented by several million dollars.

Moreover, the parameters of the assets constituting petitioner's bankruptcy estate could shift so dramatically that the confirmation order itself would be vacated. Thus, when vacating and remanding the ruling excluding the Plan from the

estate, the Nevada District Court not only held that the "bankruptcy plan cannot be confirmed without this issue being resolved," but stayed the appeal of the confirmation order by petitioner's former wife "*until the exemption issue is resolved.*" Respondent's Appendix at 2a (emphasis added).

On the shifting sands of these facts, it is premature for this Court to decide the issue of non-debtor releases. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916).

B. There Is No Conflict Among The Circuits On The Issue Of Releases Of Non-Debtors.

There is no conflict among the circuits on the issue of a bankruptcy court's authority to release or discharge a non-debtor because no Court of Appeals has actually affirmed such a release or discharge. Two of the four circuits that Petitioner claims have "expressly approved" "the bankruptcy court's power to release non-debtors," Petition at 9, did not actually reach the issue of non-debtor relief because of collateral estoppel and mootness. The other two circuits have affirmed, not releases of non-debtors, but permanent injunctions preventing suits against non-debtors where the injunctions did not release the non-debtors from liability but simply "channeled" the creditors' claims towards funds of money to which the non-debtors had contributed.

In *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973 (1st Cir. 1995), the bankruptcy court confirmed a plan of reorganization that included an injunction preventing lawsuits against non-debtors. *Id.* at 976. The First Circuit held that

Monarch Life, which did not oppose or appeal the confirmation order, was collaterally estopped from challenging the injunction when a non-debtor moved to hold Monarch Life in contempt for violating it. *Id.* at 983. The First Circuit then stated: "*We express no view on the soundness of the precedents* cited in the confirmation order [to support the injunction], nor on their applicability to the particular Plan proposed by [the debtor]." *Id.* at 983-84 (emphasis added).

In *In re AOV Indus., Inc.*, 792 F.2d 1140 (D.C. Cir. 1986),[2] the bankruptcy court confirmed a plan of reorganization that included a release in favor of non-debtors. 792 F.2d at 1143. After the plan was substantially consummated, the district court dismissed appellants' appeal from the confirmation order as moot. *Id.* at 1144. Appellants appealed to the D.C. Circuit, which held that "appellants' claims . . . (*e.g.*, the allegation that the release provisions amount to a third party discharge, in violation of Code § 524(e)) *are moot*" "except to the extent specifically mentioned in this opinion." *Id.* at 1147 (emphasis added).[3]

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[2] Although the various reporting services indicate that the decision reported as *In re AOV Indus., Inc.*, 797 F.2d 1004 (D.C. Cir. 1986), vacates in part the decision reported at 792 F.2d 1140, the services are incorrect. The former decision vacates a decision of the district court on a related appeal from the same bankruptcy case.

[3] Although the D.C. Circuit expressly did not rule on whether the bankruptcy court had the power under Bankruptcy Code sections 105(a) and 524(e) to approve the release of the non-debtors, *id.*, the D.C. Circuit did address the release in one respect. To correct the unequal treatment of different creditors classified together in the

[Footnote continued on next page]

In *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988), and *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989), the Second and Fourth Circuits affirmed injunctions preventing suits against non-debtors. 837 F.2d 89; 880 F.2d 694. These two cases were very similar -- and very unusual.[4]

In *Johns-Manville*, Manville filed for bankruptcy because of potential mass-tort liability for its asbestos products. When it filed, Manville was litigating against its insurers concerning coverage for its asbestos-related liabilities. To resolve that litigation and to fund the plan of reorganization, Manville and its insurers agreed that the insurers would pay $770 million into a settlement fund in exchange for injunctions providing "protect[ion] from claims based on" any "obligations related to the disputed policies." 837 F.2d at 90. The settlement fund was designed to pay the allowed claims of "all asbestos health victims, both present and future."[5] The Second Circuit found that "the insurance settlements [were] a cornerstone of Manville's proposed plan"

[Footnote continued from previous page]

plan, the D.C. Circuit modified the release to exclude certain claims of one creditor. *Id.* at 1153.

[4] *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1007 (4th Cir.) (describing *Johns-Manville* and *A.H. Robins* as "striking[ly] similar[ ] both factually and on the legal issues"), *cert. denied*, 479 U.S. 876 (1986).

[5] *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 640 (2d Cir. 1988).

and that the injunctions were "a critical part of the entire reorganization." *Id.* MacArthur, which claimed to be a co-insured under some of Manville's policies, challenged the injunctions. In affirming, the Second Circuit explained:

> [T]he injunctive orders do not offer the umbrella protection of a discharge in bankruptcy. Rather, they preclude only those suits against the settling insurers that arise out of or relate to Manville's insurance policies. Moreover, claims against the insurers based on Manville's policies [including those of MacArthur] are not extinguished; they are simply channeled away from the insurers and redirected at the proceeds of the settlement.

Id. at 91; *see also id.* at 93-94.

In *A.H. Robins*, Robins faced mass-tort liability for its Dalkon Shield. Robins' plan of reorganization included an injunction preventing "suits that have connection to the Dalkon Shield, against certain entities other than Robins" alleged to have been joint tortfeasors. 880 F.2d at 700. Pursuant to the plan and a class-action settlement previously approved by the Fourth Circuit (the *Breland* settlement), all Dalkon Shield claimants were to recover in full. *Id.* at 700-01.[6] "The Plan's injunction, therefore, only ha[d] real impact

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[6] In *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989) (affirming district court's certification of class and approval of *Breland* settlement), the Fourth Circuit explained the interplay between Robins' plan of reorganization and the *Breland* settlement:

[Footnote continued on next page]

upon [class] members . . . who ha[d] elected to opt-out of the *Breland* settlement." *Id.* at 701.[7] The Fourth Circuit found that permitting suits against the non-debtors protected by the injunction "would affect the bankruptcy reorganization in one way or another such as by way of indemnity or contribution." *Id.* In affirming the injunction, the Fourth Circuit explained:

> Given the impact of the proposed suits on the bankruptcy reorganization and the fact that the class B members who chose to opt-out could have had their claims fully satisfied by staying within the settlement, the bankruptcy court's

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[Footnote continued from previous page]

> The Robins Plan of Reorganization and the *Breland* settlement are intended to provide full payment of all compensatory damages suffered by all Dalkon Shield claimants who have properly filed claims. The Plan creates a Trust fund which will be sufficient to achieve this goal. . . . When the parties have funded the trust, Robins, Aetna and any successor corporations are relieved of any further liability, and this is proper since Dalkon Shield claimants will be paid by the Trust the full value of their claims. Aetna has made a minimal contribution to that fund. But that is not all that Aetna has done to assure the full payment of all Dalkon Shield claimants: It has provided an extra fund of $325 million to protect the Trust against any deficiency that may occur in the Trust Fund.

Id. at 749.

[7] The class certification and settlement established two classes. Class A was a mandatory, non-opt-out class. Of the approximately 111,000 members of class B, only 2,960 opted out of the *Breland* settlement. 880 F.2d at 700, 701 n.7.

> equitable powers support the questioned injunction. We think the ancient but very much alive doctrine of marshaling of assets is analogous here. A creditor has no right to choose which of two funds will pay his claim. The bankruptcy court has the power to order a creditor who has two funds to satisfy his debt to resort to the fund that will not defeat other creditors.

Id.[8]

The plan of reorganization proposed by petitioner bears no resemblance to the plans approved in *Johns-Manville* and *A.H. Robins*. In this case, the "global release" provision in the plan of reorganization and the fact that Resorts was not to receive any distribution would have effectively discharged the Plan in violation of Code section

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[8] *S.E.C. v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285 (2d Cir. 1992), *cert. dismissed*, 506 U.S. 1088 (1993), is another Second Circuit decision affirming a permanent injunction protecting non-debtors. *Drexel* is consistent with *Johns-Manville* and *A.H. Robins*: it is also a mass-tort case (securities fraud) in which the plan of reorganization used an injunction to channel the creditors' "'unimpaired'" claims away from certain non-debtors (Drexel's former directors and officers) and toward certain funds (approximately $800 million including the "Pooled Recovery") to which the non-debtors contributed (through the settlement of lawsuits brought by Drexel and certain creditors). 960 F.2d at 288-89. *See infra* at 13-14 (quoting *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 761 (5th Cir. 1995) (discussing *Drexel*)).

524(e).[9] Resorts' claim would have been "extinguished" and not "simply channeled away" from one source of recovery to another. *Johns-Manville*, 837 F.2d at 91.

The other five cases that petitioner cites as having held that "bankruptcy courts can never . . . confirm reorganization plans that include the release of non-debtor[s]," Petition at 9, also differ from *Johns-Manville* and *A.H. Robins* in that they are not "channeling" cases. Indeed, in one of those cases, the Fifth Circuit expressly reconciled its holding (that the discharge of a non-debtor was improper) with the Second Circuit's holding in *Johns-Manville* on that basis:

> [The debtor and the non-debtor who would have been protected by the injunction] argue that courts have upheld permanent injunctions against third parties in other cases. In those cases, however, the courts upheld permanent injunctions of third-party claims because while the injunction permanently enjoined the lawsuits, it also channeled those claims to allow recovery from separate assets and thereby avoided discharging the nondebtor. *See [Drexel]* (approving settlement that excluded class from sharing in recovery fund because class would receive fair amount from other funds), . . . *[Johns-Manville]* (holding that injunction did not

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[9] Code section 524(e) states: "Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

> discharge creditor because third-party interest could be asserted against settlement fund) . . . . The injunction at issue in this case provided no alternative means for [appellants] to recover from [the non-debtor] . . . . Accordingly, because the permanent injunction as entered improperly discharged a potential debt of . . . a nondebtor, the bankruptcy court exceeded its powers under [Bankruptcy Code] § 105.

Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 761 (5th Cir. 1995).[10]

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[10] The other four cases also differ from *Johns-Manville* and *A.H. Robins* in that the creditors' claims were not satisfied through "channeling." In *Union Carbide v. Newboles*, 686 F.2d 593, 594 (7th Cir. 1982), the debtor's president and his wife tried, through a "settlement, satisfaction, and discharge" provision in the debtor's plan, to discharge their liability as guarantors of Union Carbide's loan to the debtor, although the plan paid Union Carbide only $14,337.01 of the approximately $70,000 outstanding on the loan, and there was no indication that Mr. and Mrs. Newboles contributed any money to the plan. The facts of *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 626 (9th Cir. 1989), were virtually identical to those of *Union Carbide*; in rejecting the injunction in *American Hardwoods*, the Ninth Circuit stated: "Even if we adopted *[A.H. Robins]*, it would not dictate a different result." In *Underhill v. Royal*, 769 F.2d 1426, 1430 (9th Cir. 1985), the plan provided for the creditors to "get [only] 50% of their principal returned" while releasing "all claims against the debtor, 'any affiliate of the Debtor, and any insider of the debtor.'" Similarly, in *Landsing Diversified Properties-II v. First Nat'l Bank & Trust Co. (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592, 594 (10th Cir. 1990), *modified on other grounds sub nom. Abel v. West*, 932 F.2d 898 (10th Cir. 1991), the bankruptcy court

[Footnote continued on next page]

In sum, no Court of Appeals has ruled that a bankruptcy court has the power to discharge or release a non-debtor. The only form of "relief" for non-debtors that any circuit court has affirmed is a "channeling" injunction that provides the enjoined creditors with an alternative source of full recovery to which the non-debtors had contributed. This Court need not grant a writ of certiorari to resolve a conflict among the circuits because no conflict exists.

C. It Would Be Premature To Conclude That There Is A Conflict Among The Circuits Because No Circuit Other Than The Ninth Has Yet Considered The Effect Of Bankruptcy Code Section 524(g).

Even assuming *arguendo* that this Court believes that the cases discussed above reflect a conflict among the circuits, it would be premature for the Court to grant a writ of certiorari to resolve the conflict because a recent change in the law may affect the way the circuits rule in the future on non-debtor releases and injunctions.

On October 22, 1994, as part of the Bankruptcy Reform Act of 1994, Congress enacted Bankruptcy Code section 524(g), which expressly permits bankruptcy courts to issue "channeling" injunctions preventing suits against non-

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approved only "in limited amount" the creditor's claim against the debtor and enjoined the creditor from collecting the remainder from a non-debtor. In ruling that the injunction was improper, the Tenth Circuit distinguished *A.H. Robins* and *Johns-Manville*. 922 F.2d at 599.

debtors in a limited class of chapter 11 cases involving asbestos claims. 3 COLLIER ON BANKRUPTCY ¶ 524.07 (15th ed. 1996) (discussing 11 U.S.C. § 524(g)).

No circuit other than the Ninth has yet considered the effect, if any, of section 524(g) on a bankruptcy court's authority to grant relief in favor of non-debtors in cases other than those expressly governed by section 524(g). In the instant case, the Ninth Circuit stated:

> A recent amendment to the Bankruptcy Code buttresses our conclusion that § 524(e) does not permit bankruptcy courts to release claims against non-debtors. . . . That Congress provided explicit authority to bankruptcy courts to issue injunctions in favor of the third parties in an extremely limited class of cases reinforces the conclusion that § 524(e) denies such authority in other, non-asbestos, cases.

Petitioner's Appendix at 20a n.6. This Court should deny certiorari in this case and wait to see whether the other circuits agree with the Ninth Circuit.

D. Even If There Is A Conflict Among The Circuits, This Case Is An Unsuitable Vehicle For Resolution Of That Conflict.

Even if there is a conflict among the circuits regarding a bankruptcy court's power to grant relief to non-debtors through releases or permanent injunctions, this case is not an appropriate vehicle for this Court to resolve that conflict.

1. No Circuit Would Have Affirmed The Release In This Case.

As explained in Section B above, the only cases in the Courts of Appeals affirming any relief in favor of non-debtors are *Johns-Manville*, *A.H. Robins*, and *Drexel*. This case bears no resemblance to those cases, and there is no reason to believe that any circuit would have affirmed the "global release" provision in petitioner's plan of reorganization. Thus, this is not the proper case for this Court to decide when, if ever, a bankruptcy court may have authority to release or enjoin claims against a non-debtor.

Johns-Manville, *A.H. Robins*, and *Drexel* were all cases in which the debtor's plan of reorganization had to address hundreds of millions of dollars of mass-tort claims held by thousands of creditors. This case, in contrast, involves an individual debtor with a mere dozen creditors; one creditor -- petitioner's former wife -- held 95 percent of the value of the claims resolved by the plan of reorganization.

In *Johns-Manville*, *A.H. Robins*, and *Drexel*, there were settlement funds designed to pay the creditors' claims in full, and the injunctions approved by the Courts of Appeals "channeled" the creditors' claims to those funds. In this case, the plan of reorganization made no provision for the payment of any part of Resorts' claim against the Plan, while the "global release" provision would have effectively discharged the Plan. In *Johns-Manville*, *A.H. Robins*, and *Drexel*, the Second and Fourth Circuits found that the injunctions were

essential to the reorganizations.[11] In this case, there was no such finding -- not even by the Bankruptcy Court that confirmed petitioner's plan of reorganization.[12]

In light of these factual distinctions, even the Second and Fourth Circuits would not have affirmed the "global release" provisions in the instant case.

2. Even If A Bankruptcy Court Has The Power To Release A Non-Debtor, The Release In This Case Would Have Been Improper Because The Bankruptcy Court Lacked Subject Matter Jurisdiction.

There is ample authority to support the proposition that a bankruptcy court cannot release claims unless it has

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[11] *See Johns-Manville*, 837 F.2d at 90 ("Since the insurance settlements are a cornerstone of Manville's proposed plan of reorganization, the Bankruptcy Court's [injunctive] orders are a critical part of the entire reorganization.") (citation omitted); *A.H. Robins*, 880 F.2d at 701-02 ("It is essential to the reorganization that these opt-out plaintiffs either resort to the source of funds provided for them in the Plan and *Breland* settlement or not be permitted to interfere with the reorganization and thus with all the other creditors."); *Drexel*, 960 F.2d at 293 ("The Settlement Agreement is unquestionably an essential element of Drexel's ultimate reorganization. In turn, the injunction is a key component of the Settlement Agreement.").

[12] Indeed, the Bankruptcy Court could not have found that the "global release" provision was essential because petitioner, at a hearing on September 23, 1993, initially *agreed* to the Bankruptcy Court's removal of the provision from the plan of reorganization. Petitioner's Appendix at 9a, 10a.

subject matter jurisdiction over those claims.[13] In this case, there has been a final and unappealable ruling that the bankruptcy court lacks jurisdiction over Resorts' claims against the non-debtor Plan.[14]

This is, therefore, not an appropriate case for this Court to resolve the issue of a bankruptcy court's power to release a non-debtor because, even if a bankruptcy court has the power to grant such a release, the release in this case would be invalid for lack of subject matter jurisdiction.

II. THE ISSUE OF WHETHER RESORTS SHOULD HAVE BEEN PERMITTED TO WITHDRAW ITS CLAIM WITH CONDITIONS IS NOT WORTHY OF A WRIT OF CERTIORARI.

Petitioner argues that the Ninth Circuit "improperly impaired the ability of bankruptcy courts to control their own dockets," Petition at 15, when it found that the Bankruptcy

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[13] *See, e.g., Zale*, 62 F.3d at 751 ("Before we address whether the bankruptcy court properly exercised § 105 power to issue the injunction, we must first examine whether a basis for the bankruptcy court's subject matter jurisdiction existed."); *American Hardwoods*, 885 F.2d at 624 ("Subject matter jurisdiction and power are separate prerequisites to the court's capacity to act.").

[14] The District Court ruled: "Because the Pension Plan is not an asset of Lowenschuss's bankruptcy estate, . . . the bankruptcy court lacks jurisdiction over Resorts's claims against the Pension Plan." Petitioner's Appendix at 41a. This ruling is final because, as the Ninth Circuit found, Lowenschuss waived the issue because he did not argue it in his briefs on the merits to the Ninth Circuit. *Id.* at 20a-21a.

Court abused its discretion by denying Resorts' motion to withdraw its proofs of claim with conditions. This argument presents no issue warranting review by this Court.

As a threshold matter, there is no conflict among the Courts of Appeals about the standard governing dismissals of actions,[15] which is abuse of the trial court's discretion.[16] Nor is there any disagreement that this discretion is judicial rather than arbitrary and that a court must consider the equities presented by the plaintiff as well as by the defendant.[17]

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15 Bankruptcy Rule 3006 is "nearly identical to Fed. R. Civ. P. 41(a), and was, in fact, originally derived from that rule." *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995); *see also* Advisory Committee Note to B.R. 3006 (1983). To adjudicate claims under B.R. 3006, courts rely upon the case law governing dismissals under Fed. R. Civ. P. 41(a). *Smith*, 47 F.3d at 943.

16 *E.g.*, *Metropolitan Fed. Bank of Iowa, F.S.B. v. W.R. Grace & Co.*, 999 F.2d 1257, 1262 (8th Cir. 1993); *DWG Corp. v. Granada Invs., Inc.*, 962 F.2d 1201, 1202 (6th Cir. 1992); *American Nat'l Bank & Trust Co. v. BIC Corp.*, 931 F.2d 1411, 1412 (10th Cir. 1991); *New Mexico ex rel. Energy & Minerals Dep't v. U.S. Dep't of the Interior*, 820 F.2d 441, 443 (D.C. Cir. 1987); *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987); *McCants v. Ford Motor Co.*, 781 F.2d 855, 857 (11th Cir. 1986); *Puerto Rico Maritime Shipping Auth. v. Leith*, 668 F.2d 46, 49 (1st Cir. 1981); *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir. 1980); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); *Stern v. Barnett*, 452 F.2d 211, 213 (7th Cir. 1971); *Larchmont Eng'g, Inc. v. Toggenburg Ski Ctr., Inc.*, 444 F.2d 490, 491 (2d Cir. 1971); *Young v. Wilky Carrier Corp.*, 150 F.2d 764, 764 (3d Cir. 1945), *cert. denied*, 326 U.S. 786 (1946).

17 *See Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984) ("'the discretion vested in the court is a judicial and not an arbitrary one'") (citation omitted); *Alamance Indus., Inc. v. Filene's*, 291 F.2d

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The review of Resorts' withdrawal required the Ninth Circuit and the District Court to conduct an extensive examination of the facts. Petitioner's Appendix at 13a-17a, 42a. This Court has underscored repeatedly that it "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Berenyi v. District Director, Immigration & Naturalization Serv.*, 385 U.S. 630, 635 (1967).

Moreover, this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). In this case, the Ninth Circuit and District Court concurred in their view of the facts. Because petitioner has made no showing of error -- much less "exceptional error" -- this Court has no reason to review the withdrawal of Resorts' proofs of claim.

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142, 147 (1st Cir.) (vacated and remanded district court's refusal to dismiss action when that court had failed to weigh equities), *cert. denied*, 368 U.S. 831 (1961). *See also Davis*, 819 F.2d at 1273 (held that district court abused its discretion by denying motion for voluntary dismissal when plaintiff refused to comply with unreasonable condition); *LeCompte*, 528 F.2d at 604 (when plaintiff did not acquiesce in voluntary dismissal with conditions, court vacated dismissal and remanded to trial court to ascertain whether defendants would be prejudiced by unconditional dismissal); *American Nat'l Bank*, 931 F.2d at 1412 (held that district court did not abuse its discretion when it permitted voluntary dismissal and refused to include a condition that did not actually alleviate harm to defendant); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2364 at 297 (West 1995).

III. THE ISSUE OF WHETHER RESORTS' APPEAL IS MOOT IS NOT WORTHY OF A WRIT OF CERTIORARI.

Petitioner's argument that Resorts' appeal should have been dismissed as moot is not a reason for this Court to grant a writ of certiorari. The standard for mootness is well settled: an appeal is not moot if a court can fairly and justly fashion effective relief.[18] Petitioner concedes that this is the standard. Petition at 18 ("if a court is unable to fashion effective relief, it must dismiss an action as moot") (citing *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990)).

The determination of mootness is by its very nature factually intensive, especially in a bankruptcy appeal.[19] This

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[18] *E.g.*, *Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1038-39 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1105 (1995); *Spirtos v. Moreno (In re Spirtos)*, 992 F.2d 1004, 1006-07 (9th Cir. 1993); *Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F. 2d 322, 325 (2d Cir. 1993); *In re Andreuccetti*, 975 F.2d 413, 418-19 (7th Cir. 1992); *Rochman v. Northeast Utils. Serv. Group (In re Public Serv. Co. of N.H.)*, 963 F.2d 469, 471 (1st Cir.), *cert. denied*, 506 U.S. 908 (1992); *First Union Real Estate Equity & Mortgage Invs., Inc. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 (11th Cir. 1992); *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc.*, 841 F.2d 92, 96 (4th Cir. 1988); *AOV*, 792 F.2d at 1147; *Unsecured Creditors' Comm. of DeLorean Motor Co. v. DeLorean (In re DeLorean Motor Co.)*, 755 F.2d 1223, 1226 (6th Cir. 1985).

[19] *E.g.*, *Andreuccetti*, 975 F.2d at 418 ("[D]etermining whether an appeal has become moot requires a fact-specific inquiry into the nature of the relief sought, and the effects the relief could have on the overall reorganization plan."); *Club Associates*, 956 F.2d at

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issue would therefore require this Court to perform a detailed review of the facts of this case. This is not a proper basis for granting a writ of certiorari. *See Johnston*, 268 U.S. at 227.[20]

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1069 ("[A] court must still consider all the circumstances of the case to decide whether it can grant effective relief."); *Central States*, 841 F.2d at 96 ("The court should reach a [mootness] determination upon close consideration of the relief sought in light of the facts of the particular case."); *AOV*, 792 F.2d at 1148 ("In exercising its discretionary power to dismiss an appeal on mootness grounds, a court cannot avoid its obligations to scrutinize each individual claim, testing the feasibility of granting the relief against its potential impact on the reorganization scheme as a whole.").

[20] Furthermore, petitioner cites no case in which an appeal from the confirmation of the plan of an individual debtor was held to be moot where the exemption of pension plan funds was in dispute. *Cf. Spirtos*, 992 F.2d at 1006-07 (in individual debtor case, appeal from order finding two pension plans exempt was not moot even though debtor had "stripped the plans of their assets"). This lack of legal precedent further supports denial of certiorari on the issue of mootness.

CONCLUSION

For the reasons set forth above, and in the opinions of the Ninth Circuit and the District Court, respondent respectfully requests that this Court enter an order denying the petition for a writ of certiorari.

Dated: May 10, 1996

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

In Re:

FRED LOWENSCHUSS,

Debtor.
_____/

BEVERLY SELNICK,

Appellant, CV-N-93-778-ECR

v. **MINUTES OF THE COURT**

FRED LOWENSCHUSS, **DATE: August 18, 1994**

Appellee.
_____/

MINUTE ORDER IN CHAMBERS

The above entitled case, Selnick v. Lowenschuss (CV-N-93-778) was reassigned to this Court (document #25) so that this appeal from the bankruptcy court's confirmation of the bankruptcy plan (document #26) could be considered together with the appeal from the bankruptcy court's decision to exempt the debtor's pension plan from the bankruptcy estate (already before this Court in Selnick v. Lowenschuss (CV-N-93-565-ECR).

This Court issued an order in Selnick v. Lowenschuss (CV-N-93-565-ECR) finding that the bankruptcy court's

decision to exempt the debtor's pension plan from his estate should be vacated and that the matter shall be remanded to the bankruptcy court to be considered in light of all of the relevant evidence.

The bankruptcy plan cannot be confirmed without this issue being resolved. IT IS, THEREFORE, HEREBY ORDERED that the appeal from the bankruptcy confirmation plan shall be STAYED until the exemption issue is resolved.

CAROL C. FITZGERALD, CLERK

By /S/ Deputy Clerk
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

In Re:

FRED LOWENSCHUSS,

Debtor.
_____/

BEVERLY SELNICK,

Appellant, CV-N-93-565-ECR

v.

ORDER

FRED LOWENSCHUSS,

Appellee.
_____/

This case is before this Court on appeal from the Bankruptcy Court's order excluding from the bankruptcy estate (and therefore access by creditors--including Appellant Selnick) Debtor/Appellee's pension plan (the "Pension Plan"). The Pension Plan was excluded on the grounds that it was a multi-employee plan governed by ERISA and, therefore, protected from Appellant Selnick's claim under *Patterson v. Shumate,* 112 S. Ct. 2241 (1992).

The record shows that Debtor, Fred Lowenschuss, after refusing to comply with an equitable distribution order by a Pennsylvania Court and pursuing other efforts to nullify said distribution order, moved to Nevada in 1992 and instituted the underlying bankruptcy proceeding for

reorganization. Debtor scheduled $164,259.60 in assets (consisting primarily of claims against others of admittedly questionable worth), and liabilities of $9,121,457.54 of which more than $5,000,000 consisted of valid and final judgments obtained by Selnick as her share of the equitable distribution of marital property. Debtor declared in his schedules that his interest in the Pension Plan of his wholly owned professional corporation was exempt from the claims of his creditors, including Appellant Selnick.

Selnick objected to the claim of exemption on the grounds of *res judicata* because final orders had been given by both a Pennsylvania Court and a Texas Court. However, without hearing any evidence on that issue, the bankruptcy judge determined that the Debtor's claims for exemption were not barred on *res judicata* grounds. The bankruptcy judge decided that the Pension Plan had multiple participants as of August 24, 1992 (the date of the bankruptcy filing) and, therefore that it was ERISA-controlled, and that the exemption of the Pension Plan funds was proper. He then adopted the Debtor's proposed findings of fact and conclusions of law. Selnick's Motion for Reconsideration was denied and this appeal followed.

This Court is prepared to rule on the Appeal (document #23), Appellant's Motion to Strike Appellee's Brief (document #26), and Appellant's Objection to Appellee's Statement of Issues on Appeal (document #32).

First we will address the Motion to Strike Appellee's Brief and Objection to Appellee's Statement of Issues on Appeal together. Appellant contends that Appellee's brief raises issues that have not been designated for appeal and

contains impermissible references to documents which are not properly contained in the Record on Appeal.

As to the issues raised on appeal, both the petitioner and the respondent agree that whether Debtor's interest in the ERISA pension plan was properly excluded as property of the estate is properly before the Court. However, appellee also raises two additional issues: 1) Whether the appeal filed on behalf of Selnick is moot since confirmation of the plan of reorganization was premised on the order excluding the pension plan as property of the estate, and there was no stay of that order prior to the hearing and decision on plan confirmation; and 2) Whether Selnick filed a timely objection before the bankruptcy court to the exclusion of Debtor's interest in the pension plan.

The allegation of mootness has already been rejected by this Court's Order of April 28, 1994 (document #41) and need not be addressed further.

The argument that the issue of the failure of Appellant to properly object to the exclusion of ERISA qualified pension plan was not identified in the statement of issues on appeal is a valid issue for this Court's consideration. Rule 8006 of the Federal Rules of Bankruptcy Procedure specifies that:

> . . . Within 10 days after the service of the statement of the appellant the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal, and if the appellee has filed a crossappeal, the appellee as cross appellant shall file and serve a statement of the issues to

> be presented on the cross appeal and a designation of additional items to be included in the record . . . .

This Court agrees with the appellee that the Rule does not prohibit amendment to the statement of issues. Appellee has amended his statement of issues and appellant had an opportunity to brief the issue in her reply brief. Appellant is not prejudiced by the Court's consideration of this issue. In addition, the bankruptcy court never addressed the issue of the failure of Appellant to object to the exclusion of the ERISA pension plan. The Appellee therefore, is not required to file either an appeal or cross-appeal because there was no adverse ruling. The issue was properly raised before the bankruptcy court and never ruled upon, and this appellate court may consider this undecided issue.

As to appellee's references to the record on appeal this Court finds as follows: The accuracy of the parties statements will be verified by the Court's review of the record. Those portions of the briefs that do not refer to material entered on the record on appeal will not be considered. In addition, the depositions of Litt, Lomanaco and Lardini will not be considered. The record shows that these depositions were not filed with the bankruptcy court until well after the court had already entered its Findings of Fact, Conclusions of Law and Judgment in this matter. The Findings of Fact, Conclusions of Law and Judgment were entered on July 22, 1993. The depositions were not filed with the court until August 13, 1993. It does not appear the bankruptcy court considered these deposition even in light of the fact that Debtor's attorney briefly announced that he took such depositions while presenting his oral argument before the bankruptcy court (transcript 7/1/93 p. 141). Papers which are

not filed with the lower court or admitted into evidence are not part of the record and cannot be part of the record on appeal. *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074, 1077 (9th Cir. 1988). Moreover, papers which are submitted to the lower court after the ruling which has been challenged was made should be stricken from the record on appeal. *Id.* We are concerned only with the record before the bankruptcy judge when his decision was made.

We are now prepared to entertain the appeal on its merits. The legal rulings of the Bankruptcy Court, as to both state and federal law, are subject to *de novo* review. *In re Daniel*, 771 F.2d 1352 (9th Cir.) *cert. den.*, 475 U.S. 1016 (1986). The Bankruptcy Court's findings of fact are subject to the clearly erroneous standard of F.R.C.P. 52(a) *Id.; In re Comer*, 723 F.2d 737 (9th Cir. 1984).

The issues on appeal are as follows:

(1) Whether Appellant failed to properly object to the exclusion of the ERISA pension plan.

(2) Whether the bankruptcy court was barred, under principles of *res judicata* and full faith and credit from permitting Debtor to relitigate whether his Pension Plan assets are exempt from the claim of his former wife, Selnick, where prepetition final orders of the Pennsylvania and Texas Courts have previously established here [sic] entitlement to a portion of these assets.

(3) Whether as a matter of law, notwithstanding the bankruptcy court's rulings

the debtor was the sole participant in his pension plan such that it was not subject to ERISA and was properly subject to the judgment obtained against it and the Debtor by Selnick prior to the commencement of these proceedings.

(4) Whether the Bankruptcy Court improperly excluded material evidence bearing on the Debtor's credibility, the scope of the prior state court proceedings and expert opinion on the requirements for a multi-employee pension plan under ERISA.

A. Background

The appellant in this matter was formerly the Debtor's wife. Appellant instituted divorce proceeding in 1981. Only after almost ten years of litigation was the Court of Common Pleas of Montgomery County, Pennsylvania (the "Divorce Court") able to grant a Decree of Divorce and make findings with respect to the Lowenschuss marital property which he valued at $10,576,300. The judge in those proceedings awarded each of the parties a "fair distribution of the marital property" finding that they should share equally in the marital assets.

The judge ordered that appellant Selnick should receive 1) the equity in the parties' former marital home; 2) $830,000 plus $464,900 in interest for marital assets improperly diverted or dissipated by the Debtor; and 3) $3,173,490 which the Debtor was directed to pay from the Pension and Profit Sharing Plan and certain other payments. The judge held that awarding all of these items would require

less dependence of Selnick on the Pension and Profit Sharing plan and reduce the percentage due her to 38.7% or $3,173,490. The judge apparently was concerned, due to Debtor's past conduct, that Debtor would attempt to minimize any monies due to the plaintiff. The judge also specified who would be responsible for the tax liability and any penalties for liquidating the pension plan.

Debtor was given 90 days to complete the transactions required according to the equitable distribution decree. Instead of transferring the assets as ordered however, he transferred his Pension Plan assets from Philadelphia, Pennsylvania to Sun Bank in Florida and Santa Barbara Bank & Trust Company in California. The Debtor failed to make any of the transfers of property to Selnick ordered by the judge, including the $3,173,490 that was to have come from the Pension Plan.

The Debtor, filed and argued a post-trial motion and filed an appeal to the Superior Court of Pennsylvania. In the post 1991 Order proceedings, the Debtor's attorneys only questioned the "fairness" of the judge's equitable distribution. The Debtor never appealed from the judge's order assuming jurisdiction over the Pension Plan. The Debtor's application to the judge who issued the equitable distribution order, the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania for a supersedeas were all denied.

Ultimately Selnick filed a Petition for Contempt and Enforcement based upon the Debtor's non-performance and a hearing was scheduled on that petition. Debtor was ordered to bring any and all documents which reflect the assets held in Fred Lowenschuss Associates, Attorneys at Law Pension and Profit Sharing Plan to that hearing. The Debtor failed to

appear or produce any documents at that scheduled hearing and the Pennsylvania Court issued a Bench Warrant for his arrest, and ordered him to answer the Notice to Produce.

At the second scheduled hearing Debtor again failed to produce the required documents or appear; however, on that date, the Debtor's attorneys filed an "Answer and New Matter to Wife's Petition for Contempt and Enforcement" which included the claim that the judge's order was invalid under ERISA. The answer also included the argument that because the judge did not frame his equitable distribution order as a Qualified Domestic Relations Order (QDRO) it was not valid.

The judge determined that the ERISA arguments had been raised in the post-trial argument and rejected, and entered an Order on February 10, 1992 freezing "all assets, bank accounts, brokerage accounts, Fred Lowenschuss Associates Pension Plan, Fred Lowenschuss IRA, or any other account, asset, trust or property subject to the control of Fred Lowenschuss except upon further order of the Court,["] and issued another bench warrant for the Debtor's arrest for failure to appear. The bench warrants were never successfully executed because the Debtor left Pennsylvania.

The Pennsylvania Superior Court quashed Debtor's appeal from the 1991 Divorce and Equitable Distribution Order with prejudice and the Debtor's "Cross Motion to Vacate the Order of February 10, 1992 of the Common Pleas Court as Well as All Arrest Orders" was also denied. Debtor did not appeal those decisions.

On March 13, 1992 the Pennsylvania judge entered judgment in favor of Selnick and against both the Debtor and

the Pension Plan in the amount of $5,345,090 plus interest. Debtor appealed and Selnick moved to quash the appeal. Ultimately the appeal was dismissed without prejudice due to the bankruptcy action at issue and the federal bankruptcy stay granted pursuant to that action.

Meanwhile, Debtor had attempted to prevent enforcement of the Judgment against the Pension Plan assets in Pennsylvania, Texas, Minnesota, California, Florida, Oklahoma, New York and New Jersey. On May 12, 1992 Selnick instituted an action in the District Court of Harris County, Texas to enforce her Judgment against certain Pension Plan assets. The Debtor resisted execution on the basis of their contention that the judge lacked power, without a QDRO, to enter either his original equitable distribution order of July 19, 1991 or his Judgment on March 13, 1992 against the Pension Plan.

The Texas Court denied all of Debtor's motions and concluded that a final judgment against Debtor Fred Lowenschuss and the Fred Lowenschuss Associates, Attorneys at Law Pension and Profit Sharing Plan had been properly authenticated by the rendering jurisdiction of the Montgomery County, Pennsylvania Court and that he judgment was entitled to be accorded full faith and credit.

B. Analysis

With regard to the issue of whether Selnick's objections to the claims of exemption was timely filed, this Court finds that the objection was timely filed and free from any procedural defect. Federal Rule of Bankruptcy Procedure 4003 provides that a creditor may file objections to a claim of exemption within thirty days after the first meeting of the

creditors. The Debtor concedes that the Objection was timely filed.

Rule 4003 further provides, "Copies of the objection shall be delivered or mailed to the trustee and to the person filing the list, and the attorney for such person." The Debtor's attempt to invalidate the Objection is based on the argument that the Objection was never served nor service verified by an affidavit of service. However, the original Objection, which was timely filed, conforms exactly with the Amended Objection which was served as well as filed 9 days later. The Court further notes that Debtor's argument can only be disingenuous considering the manner and scheduling of his objections to the Pennsylvania Court's equitable distribution order of 1991.

With regard to the issue of whether the bankruptcy court should not have permitted Debtor to relitigate whether Selnick has an interest in the Pension plan and other assets, the record shows that there is evidence, not considered by the bankruptcy court, that the Pennsylvania Court did address the issue of whether or not the Pension Plan could be exempted and ultimately found that Selnick had a right to it the proceeds [sic] from the plan. The Court[s] also found that the equitable distribution order did not have to be presented in the form of a QDRO. Furthermore, it is undisputed that the Pennsylvania judge's order contained all the information required in a QDRO and that the judge determined that he need not file the order in the form of a QDRO. It appears that the bankruptcy court failed to consider this evidence. If true, it appears the Pennsylvania court's award to Selnick of a property interest in, and then a judgment against the pension plan were valid and final Pennsylvania orders, rendered before the present proceeding was instituted. Although we are in no

way bound or influenced by it, this finding is consistent with the Texas Court's finding in its order affording the Pennsylvania orders full faith and credit.

The Court further notes that, right or wrong, the Pennsylvania Court's decision in that case would be binding on this Court. However, it appears that the judge's conclusion that he could properly enter judgment against the Pension Plan was correct. An interest in a pension plan is "marital property" and as such, subject to equitable distribution under the Pennsylvania Divorce Code. *Zollars v. Zollars*, 579 A.2d 1328 (Pa. Super. 1990); *Miller v. Miller*, 577 A.2d 205 (Pa. Super. 1990). It appears then that the order awarding Selnick 38.7% of the Debtor's interest in the Pension plan was in accordance with Pennsylvania law.

Appellant is also correct in asserting that *Res Judicata*, or claim preclusion bars relitigation of claims between the same parties if those claims were actually litigated *or could have been litigated*. *See*, e.g. *In re Daley*, 776 F.2d 834 (9th Cir. 1985). The bankruptcy court did not address this issue or consider any evidence on whether or not the claims were or could have been litigated. *Res Judicata* insures the finality of decision. A final judgment on the merits bars further claims by parties or their privities based on the same cause of action. The theory behind *res judicata* was emphasized in the case cited by Debtor, *Brown v. Felson*, 442 U.S. 127 (1979). Debtor attempts to make the argument that an intermediate court's decision holding that res judicata precludes a creditor from contending that a Debtor's debt to him was not dischargeable, is reversible. Although in *Brown v. Felson*, the Supreme Court did reverse the bankruptcy and intermediate court decision holding that res judicata precluded

such an argument, the decision was narrowly focused on the facts of that case which are inapposite to the facts of this case.

As to the issue of whether the Debtor's plan was ERISA qualified, this court finds that there is evidence in the record, not considered by the bankruptcy court that shows that the Debtor's plan was not ERISA qualified and therefore should not have been exempted from the Debtor's estate under *Patterson v. Shumate*, 112 S. Ct. 2242 (1992). In *Patterson*, the Supreme Court held that the assets of a truly qualified multi-participant ERISA pension plan (in that case involving 400 participants) are excludable from the bankruptcy estate of the plan participant. The Supreme Court in *Patterson* premised its opinion on the fact that the pension plan there was an ERISA-qualified plan. However, the record suggests that the *Patterson* principle has no relevance here and that this case is more analogous to *In re Hall, Debtor*, 151 B.R. 412 (W.D. Mich. 1992). In *Hall* the court considered a Debtor's claim of exemption for a pension plan of which, at the time of Debtor's bankruptcy, the Debtor and his spouse were the sole participants and the only shareholders of the company which established the plan. There, as in this case, no contributions were being made currently on behalf of other employees, although such contributions had been made for a period in the past. There as here, the Debtor claimed his interest in the pension plan was entitled to ERISA exemption because his plan was "ERISA qualified." The court held that because the plan currently had no participants other than the owner of the business, the plan was not an "employee" plan and, therefore not ERISA governed. Thus the Debtor's interest in the plan was not exempt from the claims of his creditors. It appears that there is evidence in the record that was not considered by the bankruptcy court, that shows that Debtor's pension plan

was not ERISA qualified because Debtor was really the only participant and in addition, even if there were other plan participants, the Debtor failed to make contribution to the pension plan for the other employees. This Court is very skeptical of the finding that the Debtor's sons were participants in the plan, and their participation was sufficient to make the plan an exempt asset. Had the bankruptcy court considered all the evidence, this court questions if the same finding would have been made.

Consequently, this Court's decision of this matter rests on the final issue -- whether the bankruptcy court excluded material evidence relevant to the Debtor's credibility, the scope of the state court proceedings and ERISA requirements for a pension plan. As stated above, this Court finds that the bankruptcy court failed to take into account relevant evidence which it must do before rendering a decision that is reviewable by this Court. Namely, this Court finds that the bankruptcy court's refusal to admit evidence, evidence originally specifically requested of the appellant by that court, regarding the Res Judicata and full faith and credit issue was inappropriate. Moreover, this Court finds that the bankruptcy court's refusal to consider all the relevant evidence regarding the qualification of Debtor's Pension Plan as an ERISA plan, is error.

For this reason, this Court determines that the case is not ripe for the entry of final judgment on the issue of exemption.

IT IS THEREFORE HEREBY ordered that the bankruptcy court's decision regarding the res judicata issues and the exemption of the Pension Plan are VACATED and

this case is REMANDED to the bankruptcy court to determine these issues in light of all the relevant evidence.

IT IS FURTHER ORDERED that the bankruptcy court convene and conclude the taking of testimony and in that connection:

a. admit in evidence the deposition and related exhibits of Albert Momjian, Esq.;

b. permit Saul Levit, Esq. to testify to matters referred to in Selnick's Motion for Reconsideration as to which Mr. Levit was to have testified for the first time, and which have not been covered by other witnesses;

c. permit Jerome Kellner, CPA to testify on the matters related to his knowledge regarding Selnick's Motion for Reconsideration;

d. admit into evidence expert opinions from the testimony of the Debtor and Mr. Bolden in the Divorce Case as to the number of Pension Plan participants at that time;

e. admit the evidence of other failures of the Debtor to produce relevant documents tendered on July 1, 1993;

f. permit the Debtor to tender any additional evidence on the Exemption issue and permit Selnick to tender any evidence responsive to that in rebuttal; and

g. permit Selnick leave to petition to the Pennsylvania Court to restate its Equitable Distribution order as a QDRO.

DATED: August 19, 1994.

/S/ Edward C. Reed

UNITED STATES DISTRICT JUDGE